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# In The
# Supreme Court Of The United States

OCTOBER TERM, 1988

IN RE WILLINGTON CONVALESCENT HOME, INC., DEBTOR

MARTIN W. HOFFMAN, TRUSTEE
*Petitioner*

v.

STATE OF CONNECTICUT, DEPARTMENT OF INCOME MAINTENANCE,
STATE OF CONNECTICUT, DEPARTMENT OF HEALTH SERVICES
and
UNITED STATES OF AMERICA
*Respondents*

IN RE EDWARD ZERA, DEBTOR

MARTIN W. HOFFMAN, TRUSTEE
*Petitioner*

v.

STATE OF CONNECTICUT, DEPARTMENT OF REVENUE SERVICES
and
UNITED STATES OF AMERICA
*Respondents*

## BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED

1. Whether Congress in 11 U.S.C. § 106(c) intended to abrogate the States' Eleventh Amendment immunity from bankruptcy actions seeking money damages?

2. Whether Congress has the constitutional authority under the bankruptcy clause to abrogate the States' Eleventh Amendment immunity from bankruptcy actions seeking money damages?

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## STATEMENT OF THE CASE

The petition for certiorari arises from two separate bankruptcy cases that the Court of Appeals decided jointly. These cases have some issues in common, but these issues do not merit review. In addition, one of the cases presents separate grounds for nonreviewability.

1. *In re Willington Convalescent Home, Inc.* involves a nursing home facility that participated in the Connecticut Medicaid Program. *See* Pet. App. at A28–A33. Willington agreed to provide nursing care services to indigent patients eligible under Title XIX at a specific per diem rate of compensation. The State determined the per diem rate from annual cost reports submitted by Willington.

Under the program the State initially accepts at face value the cost data submitted by nursing homes such as Willington, but then conducts subsequent field audits to verify that the costs claimed are legitimate. If costs are found to have been improperly or falsely claimed, the State is obligated to adjust the per diem rate retroactive to the applicable rate year and recoup the amount of Medicaid overpayment from whatever monthly payments may be due and owing to the facility for current patient care. Unless or until the field audit has taken place, there is no final determination that the monthly Medicaid payments in fact belong to the nursing home at all. If the nursing home disputes the findings made in the field audit, it may seek an administrative hearing within the Department of Income Maintenance, and then seek judicial review by appeal to the Connecticut Superior Court.

In this case Willington submitted sworn cost reports for the years 1976 to 1980 that claimed real property costs of $294,007.00. On the basis of these reports, the State set per diem Medicaid rates for those years. A subsequent field audit disclosed, however, that Willington's actual costs were only $22,500.00. As a result of its false reports, Willington had received substantial Medicaid overpayments for these five rate

years. Accordingly, the Commissioner of the Connecticut Department of Income Maintenance issued two Medicaid rate decisions in 1982 adjusting downward Willington's per diem rates for the years 1976 and 1980, and 1977 through 1979, respectively. The effect of these decisions was to commence the recoupment of the substantial Medicaid overpayments Willington had received.

Willington did not contest the recomputation of its rates for 1976 and 1980, but did request administrative review of the 1977 through 1979 decision. Soon thereafter, however, Willington moved to postpone the administrative hearing indefinitely. Meanwhile, in June, 1982, shortly after recoupment of the past Medicaid overpayments had commenced, Willington filed a Chapter 11 petition in bankruptcy.[1]

While in bankruptcy Willington continued to participate in the Medicaid program and to receive monthly checks. The State sought to and did recoup a modest amount of the past Medicaid overpayment from the monthly payments due Willington for on-going patient care. In April, 1983, Willington shut down permanently, still owing the State $121,408.00.

In July, 1983, the bankruptcy court converted the case from Chapter 11 to Chapter 7 and appointed the petitioner as Trustee. The Trustee then filed the present adversary complaint in the nature of a turnover proceeding under 11 U.S.C. § 542(b) against the State seeking payment of $64,010.24 for services rendered to Medicaid patients by Willington during March, 1983. The State at no point during these proceedings filed a proof of claim, scrupulously avoiding doing anything that could be construed as a waiver of its Eleventh Amendment immunity.

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[1] This result is not uncommon. The pattern in the Connecticut nursing home industry, and the actual practice in this case, is for the owners of the nursing home entity to form a partnership to own assets such as land, buildings, and furnishings, and to form a corporation to constitute the nursing home entity. In that way the corporation can file for bankruptcy to discharge its debts, while the owners can remain out of bankruptcy and retain the assets.



2. In *Zera*, a Connecticut business operated by Edward Zera owed the State Department of Revenue Services sales and use taxes, and associated fees. *See* Pet. App. at A73–A75. In September, 1983, the Revenue Department issued a tax warrant, which resulted in a payment of $2,100.62 to the State.

Zera filed for Chapter 7 bankruptcy relief on October 7, 1983 and the bankruptcy court appointed the petitioner as Trustee. The Trustee filed an adversary complaint against the Department seeking to avoid the $2,100.62 payment as a preference under 11 U.S.C. § 547(b) and to recover monies transferred pursuant to 11 U.S.C. § 550(a). Although the Connecticut Department of Labor filed an unrelated proof of claim against Zera, the Department of Revenue Services filed no proof of claim.

3. The State essentially concurs with the petitioner's recitation of the subsequent procedural events in both cases. *See* Pet. at 9–13. It is important to add, however, that in both cases the State consistently argued that, even assuming Congress intended to abrogate the State's Eleventh Amendment immunity pursuant to 11 U.S.C. § 106(c), it had no constitutional power to do so under the bankruptcy clause of Article I, § 8. Because the District Court and the Court of Appeals found that Congress did not intend to abrogate the Eleventh Amendment pursuant to § 106(c), neither court reached this constitutional issue. Pet. App. at A8, A69–A70, A92.

## REASONS FOR DENYING THE PETITION

1. Although the petitioner refers to a "direct conflict" between the decision below and that of the Seventh Circuit in *In re McVey Trucking Co., Inc.*, 812 F.2d 311 (7th Cir.), *cert. denied*, 108 S.Ct. 227 (1987), such a statement requires qualification. While it is true that the Second and Seventh Circuits disagreed concerning whether Congress intended to abrogate the States' Eleventh Amendment immunity in 11 U.S.C. § 106(c), the Seventh Circuit candidly admitted that the result it reached "may appear to be at odds with the expansive language that the Supreme Court has often employed in discussing the Eleventh Amendment and sovereign immunity." 812 F.2d at 327–28.[2] Further, the Seventh Circuit devoted the bulk of its opinion to its conclusion that Congress has the constitutional power under the bankruptcy clause to abrogate the Eleventh Amendment, *id.* at 314–23, an issue that the Second Circuit did not reach. Thus on this issue no conflict at all exists between the two Circuits.

In any event, a partial conflict between two Circuits on the statutory issue in this case does not provide an adequate basis for a discretionary grant of certiorari. The interpretation of § 106(c) is a relatively novel issue in the Courts of Appeals. Further development of the issue by the Circuits may produce a consensus, presumably in line with the decision below. In that event, there would be no real conflict for this Court to resolve. At this point, then, the issue is simply not ripe for a grant of certiorari.

2. The petitioner's alternate contention that the decision below conflicts with this Court's decision in *Fitzpatrick v. Bitzer*, 427 U.S. 455 (1976), is completely inaccurate. The question in *Fitzpatrick* was again the constitutional one of whether

[2] Indeed, the Seventh Circuit itself had only several years earlier held that the Eleventh Amendment barred an action in bankruptcy court by physicians seeking Medicaid funds from the State. *In re Friendship Medical Center, Ltd.*, 710 F.2d 1297, 1299–1301 (7th Cir. 1983).



Congress has the power — in that case under the Fourteenth Amendment — to abrogate the Eleventh Amendment. Since, as discussed, the court below did not reach that issue, no conflict exists with *Fitzpatrick*.[3]

3. Given that the State has raised the constitutional issue in the courts below, the petitioner, in order to obtain a reversal, would have to prevail on both the statutory and the constitutional issue. But this case is a singularly inappropriate one to address the constitutional issue of whether Congress under the bankruptcy clause has the power to abrogate the Eleventh Amendment. For neither the Court of Appeals nor the District Court reached this issue. This Court should not decide such a complex issue on a silent record.

4. Even aside from the possibility of affirmance on constitutional grounds, the decision below was undoubtedly correct. This Court has stated that it will find a Congressional waiver of immunity only when Congress makes its intention "unmistakenly clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). There is nothing in the language of § 106(c) — the key provision of which provides that "a determination by the court of an issue arising under such a provision binds governmental units" — to support the proposition that § 106(c) unequivocally waives the States' constitutional immunity from actions for money damages. Indeed, § 106(c) does not even mention money damages or any similar term. The conclusion of the Court of Appeals that § 106(c) "waives sovereign immunity only to the extent necessary for the bankruptcy court to

[3] The petitioner attempts to redefine *Fitzpatrick* as a statutory case addressing the issue of whether Congress intended to waive the Eleventh Amendment under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, and then suggests that the decision on this issue is at odds with the decision below in the present case. In actuality, however, the statutory issue in *Fitzpatrick* was resolved in the lower courts and not contested in this Court. 427 U.S. at 450–51. In any event, Title VII and § 106 of the Bankruptcy Code are two different statutes with different legislative histories. *See* 427 U.S. at 449 n.2.

determine a state's rights in the debtor's estate," Pet. App. at A13, is much truer to the language of § 106(c) that "a *determination* by the court of an *issue* arising under such a provision binds governmental units." (Emphasis added.) Such a conclusion is also truer to the legislative history, which suggests that the primary purpose of § 106(c) was to codify the authority of the federal courts to make dischargeability or similar determinations against the government even when the government had filed no proof of claim. *See* Pet. App. at A13–A15. In short, the language and legislative history of § 106(c) does not make "unmistakenly clear" anything other than that federal courts may make prospective declarations of federal law against governmental units. *Atascadero State Hospital v. Scanlon, supra.*[4]

5. There are several separate grounds for nonreviewability in *Willington*, thus making the entire petition inappropriate for review. First, the District Court invoked as an alternative ground the theory, accepted by many other courts, that Medicare and Medicaid agencies have the contractual right to recoup from post-bankruptcy monthly payment checks any pre-bankruptcy past overpayments. *See, e.g., In re B&L Oil Co.*, 782 F.2d 155, 157 (10th Cir. 1986); *Lee v. Schweiker*, 739 F.2d 870, 875–76 (3rd Cir. 1984). The District Court specifically found:

> However, should the Court of Appeals for the Second Circuit or the United States Supreme Court conclude that the bankruptcy court did properly assert jurisdiction over the trustee's claim, it is found — for essentially the reasons given in the Brief and reply [sic] Brief of the Appellants — that the terms of Willington's contract with Connecticut entitled the state

[4] Contrary to the petitioner's contention, the court below did analyze other sections of the Bankruptcy Code, such as 11 U.S.C. §§ 542(b) and 547(b), to which § 106(c) relates. *See* Pet. at 21, 22; Pet. App. at A17–A18.



> to recoup past overpayments to Willington by withholding the funds due for services provided in March, 1983.

Pet. App. at A70–A71. The Court of Appeals left this finding undisturbed and the petitioner has not challenged it in this Court. Thus it appears that there exist independent, alternate grounds for the decision below in *Willington* and that the petitioner has merely presented this Court with an academic question.

Second, the trustee in *Willington* remains free to pursue the state administrative remedies for challenging rate determinations that he has so far chosen to bypass. The State has never attempted to foreclose these remedies. The availability of these state administrative remedies makes it entirely unnecessary for this Court to address the scope of the Trustee's power to sue the State for Medicaid payments in bankruptcy court.

## CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

Respectfully submitted.

Connecticut Department of
Income Maintenance
Connecticut Department of
Health Services
Connecticut Department of
Revenue Services

Respondents

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